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**IN THE UNITED STATES DISTRICT COURT**  
**DISTRICT OF OREGON**  
**PORTLAND DIVISION**

**SMITH & NEPHEW, INC, and JOHN O.**  
**HAYHURST, M.D.,**

Case No. 3:04-cv-00029-MO

Plaintiffs,

v.

**ARTHREX, INC.,**

Defendant.

**ARTHREX INC.'S NOTICE OF  
SUPPLEMENTAL AUTHORITY ON  
INDIRECT INFRINGEMENT IN  
SUPPORT OF ARTHREX'S MOTION  
FOR NEW TRIAL**

Presently pending before the Court is Defendant Arthrex, Inc.’s (“Arthrex”) Motion For a New Trial, in which Arthrex seeks a new trial under Fed. R. Civ. P. 59 with respect to, among other things, indirect infringement. One of the issues raised in that briefing is the appropriate standard for establishing knowledge of the infringement by Arthrex. In an opinion issued June 25, 2013, the Federal Circuit clarified that the standard for this requisite knowledge of the infringement is actual knowledge (which can be established by willful blindness). *Commil USA, LLC v. Cisco Sys.*, No. 2012-1042, 2013 U.S. App. LEXIS 12943 (Fed. Cir. June 25, 2013). In *Commil*, the Court held that a jury instruction permitting a finding of induced infringement if the defendant “knew or should have known” about the underlying direct infringement was legally erroneous. *Id.* at \*9 (“Therefore, to the extent our prior case law allowed the finding of induced infringement based on recklessness or negligence, such case law is inconsistent with *Global-Tech* and no longer good law.”). Arthrex respectfully requests that the Court consider *Commil* in determining whether the evidence at trial clearly weighs against the finding of liability for indirect infringement – particularly when viewed under the now-clarified standard.

Dated: July 17, 2013

By: /s/ Charles W. Saber

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 17, 2013, I caused the foregoing **ARTHREX INC.'S NOTICE OF SUPPLEMENTAL AUTHORITY ON INDIRECT INFRINGEMENT IN SUPPORT OF ARTHREX'S MOTION FOR NEW TRIAL** to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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